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VALIDITY OF THE PROPOSED RESERVATIONS TO THE PEACE TREATY

Treaties are primarily contracts between states, and if of any effect at all, reservations are parts of treaties, and have precisely the same status.[1] To be valid under international law they must be mutually consented to by competent parties acting through free agents and on subjects not contrary to the policy of international law or depriving non-signatories of preëxisting rights under international law or treaty.[2] To determine the reality of consent, the constitutional law of each state must be appealed to. It alone can show the organs whose consent can bind the state. If an agent acts beyond the powers given him by the treaty power in the state, his act is of no effect in either national or international law.[3] The same would be true, if the treaty power itself exceeded the powers formally given it by the constitution.[4] Thus if the French President on his own authority alone ratified a treaty, on a subject which by the express terms of the constitution requires consent of the chambers,[5] his act would not bind France at international law. If on the other hand, the treaty power, acting within its formal powers, concludes a treaty which if carried out would

[1]Wright, Amendments and Reservations to the Treaty, 4 Minn. Law Rev. 17.

[2]Wilson and Tucker, International Law, (7th ed.) 213; Hall, International Law, (7th ed.) § 108; Willoughby, The Constitutional Law of the United States, (1910) § 196; Crandall, Treaties, Their Making and Enforcement, (1916) § 4; Wright, Conflicts between International Law and Treaties, 11 Am. Journ. Int. Law, 566-579.

[3]Crandall, *op. cit.*, § 3.

[4]*Ibid*, §§ 1, 2. Wheaton, Elements of International Law, (Dana ed.) § 265.

[5]Constitutional Law on the Relation of the Public Powers, July 16, 1875, art. 8.

violate other limitations of the constitution, the treaty, nevertheless, would be valid under international law, and the other parties can present valid claims if it is not executed. They can not be expected to know the intricacies of constitutional limitations in the states with which they deal. Of the constitutional prerequistes for the *conclusion* of a treaty they are presumed to be informed. It is otherwise with the constitutional limitations upon the *execution* of a treaty.[6] As an example, the United States constitution gives the power to make treaties in unqualified terms to the president acting with the advice and consent of two-thirds of the senate. The treaty power thus defined, ought by its oath to the constitution to respect limitations imposed by the constitutional rights of individuals, of the states, and of the departments of government, but if it does not in a particular case, the responsibility of the United States under international law is nevertheless engaged, however incapable of execution the instrument may be under the constitution. Thus, it is necessary to distinguish the validity of treaties under constitutional law from their validity under international law.

States have usually been jealous of their sovereignty. They have been reluctant to limit their self-determination in choosing the instruments and methods for executing the responsibilities and obligations undertaken by treaty. In fact, independence has always been held to include the power of a state to alter its constitutional organization at will,[7] a power which would be compromised by a treaty which specified the organs of government competent to execute certain acts.[8] Consequently, treaties have usually read,

[6]"The government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations." Mr. Livingston, Sec. of State, to Mr. Serurier, June 3, 1833, 2 Wharton, International Law Digest, 67. "For it does not need to be observed that though by holding a treaty provision unconstitutional, that provision is denied legal validity in this country, the United States is not thereby released from its obligations under it to the other signatory powers, and the result is necessarily a breach of our covenant with those powers." 1 Willoughby, *op. cit.* 505. See also *infra,* note 9.

[7]"The following are the most important of the rights flowing from that of sovereignty, or autonomy and independence; (1) To establish, maintain, and choose its own constitution and form of government, and select its own rulers. * * *" Hershey, The Essentials of International Public Law, (1912) 147. See also, Wilson, Handbook of International Law, (1910) 56; Bonfils, Manuel de droit international public, § 254.

[8]*Infra,* footnote 113.

"The High contracting parties will do so and so" or "The United States agrees, etc." or "Germany renounces, etc." Mention of the congress, or the president, or parliament is carefully avoided. It is recognized that the treaty imposes on all these organs whatever functions are necessary for its full execution[9] but the definition of these functions is usually regarded as a domestic, not an international matter.[10]

There has in recent times been a tendency to refer to particular organs of government in treaties, for which three reasons may be suggested: (1) The separation of departments of government, making it expedient or even constitutionally necessary for the treaty power to get the consent of some other authority before the treaty becomes effective;[11] (2) the tendency for colonies and non-sovereign entities to enjoy autonomous rights and to enter directly into international relations;[12] and (3) the tendency of treaties to

[9]"A treaty though complete in itself, and the unquestioned law of the land, may be inexecutable without the aid of an act of Congress. But it is the constitutional duty of Congress to pass the requisite laws. But the need of further legislation, however, does not affect the question of the legal force of the treaty per se." Cushing, Att. Gen. (1854) 6 *op.* 291; *cite* 5 Moore, Digest of International Law, 370. See also, 1 Willoughby, *op. cit.*, 487; Wheaton, *op. cit.*, § 266, and Dana's Notes, 339, 715; Iredell, J., in Ware *v.* Hylton (1796) 1 Dall. 199; and citations in Wright, 4 Minn. Law Rev. 32.

[10]*Infra,* footnotes 28, 113.

[11]Wright, The Legal Nature of Treaties, 10 Am. Journ. of Int. Law, 711; The Constitutionality of Treaties, 13 *Ibid,* 265; Holland, Studies in International Law (1898) 190; Crandall, *op. cit.*, 182, 192, 281. As examples of provisions contingent upon action of the legislative body, see Reciprocity and Revenue Conventions—U. S.-Hawaii, 1875, art. 5; U. S.-Mexico, 1883, art. 8 (Congress did not pass the necessary measure); U. S.-Cuba, 1902, art. 11; Great Britain-Austria, 1865, Great Britain-Spain, 1886; Great Britain-Greece, 1890; Great Britain-Portugal, 1914, art. 6; Fisheries Conventions U. S.-Great Britain, 1854, art. 6; 1871, art. 33; Great Britain-France, 1857, 1904; cession of territory conventions, Great Britain-Germany, 1890, (Heligoland); Extradition conventions, Great Britain-France, 1852; and Hague Convention, No. 10, 1907, art. 21. Sound and river dues conventions concluded by the United States with Denmark, (1857, art. 6); Hanover, (1861, art. 5); Belgium, (1863, art. 5), are not to take effect until the necessary laws are passed or constitutional requirements complied with, but fulfilment of such requirements was made an obligation.

[12]Wright, The Constitutionality of Treaties, 13 Am. Journ. Int. Law, 258, 265; Tupper, Treaty Making Power of the Dominions, 17 Journ. Comp. Legislation, 5. The United States has sometimes made the effectiveness of treaties within the states, dependent upon their acceptance, see U. S.-France, 1853, art. 7; U. S.-Great Britain, 1783, art. 5, (compensation of loyalists), and Great Britain has often done so with the self-governing dominions, see U. S.-Great Britain, 1899, art. 4, (alien landholding); 1908, art. 2, (arbitration); General Convention for Publication of Customs Tariffs, 1890, Malloy, Treaties, etc., p. 1996.

be of executory character, increasing the importance of administrative detail.[13]

The treaty with Germany illustrates the second and third of these tendencies. Thus it accords powers and responsibilities to certain non-sovereign entities.[14] It also specifies the powers of various commissions and of organs of the League of Nations. These, however, are organs created by the treaty itself.[15] In general, it imposes powers and responsibilities on states and does not burden specific organs of government.[16]

The first tendency referred to is emphasized by the proposed reservations, six of which attempt to confer powers upon specific organs of the United States government. These reservations will call for special attention in considering the validity of the Lodge resolution of ratification from the standpoints of constitutional and of international law.

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[13]Wright, 13 Am. Journ. Int. Law 243. Treaties have often specified the functions of such exterritorial officials as consuls, see, 12 Am. Journ. Int. Law 70; and for examples: treaty, U. S.-France, 1788, and decisions sustaining the exercise of criminal jurisdiction by American consuls in Japan on basis of U. S.-Japan treaty, 1858, art. 6, (In re Ross, (1890) 140 U. S. 453); and of jurisdiction in disputes between seamen by German consuls in the United States on basis of U. S.-Prussia treaty, 1828, art. 10 (The Konigen Luise (1910) 184 Fed. 170). Treaties have also often set up international agencies and defined their functions, (see I and XII Hague Conventions 1907; Algeciras Conventions, 1906, Chap. 1, and the numerous conventions establishing International Administrative Unions, Sayre, Experiments in International Administration, 1919), but few if any instances exist of treaty provisions defining the functions of executive or administrative officials of the state within its own territory.

[14]British colonies are made members of the League of Nations, (Annex following art. 26), and the people in certain defined areas are accorded the privilege of self-determination by plebiscite, (Saar Basin, art. 49, annex art. 34; Upper Selisia, art. 88, annex art. 1-5; Part of East Prussia, art. 94-97; Part of Schleswig, art. 109; Eupen and Malmedy, art. 34.)

[15]The most important follow: The assembly, (art. 3), council, (4) and court (14) of the League of Nations; commissions for administering territories, (50, annex par. 17, 103), for control of mandatories, (22) and for supervising general disarmament (9) under the League of Nations; tribunals and commissions for supervising river navigation, (336, 340, 341, 342, 347, 355), a general labor conference (389) and an international labor office (393); special commissions for locating boundaries on the spot, (35, 48, 83, 87, 101, 111), for conducting plebiscites, (88, annex par. 2, 95, 97, 109), for administering reparations, (233), for controlling German military preparations, (203), a mixed tribunal (304) and local clearing houses (296, annex par. 1) for the settlement of pecuniary claims and contracts between enemies, and a special tribunal for trial of the Kaiser (227).

[16]The detailed provisions for military and naval organization in Germany may be considered exceptions, in that they not only limit the size of military and naval forces and material but also provide the methods by which it must be organized. (Arts. 160, 194.)

I. Validity Under Constitutional Law

No treaty provision has ever been declared unconstitutional in the United States, but it is generally recognized that the treaty power is a creature of the constitution and must conform to its terms.[17] In general, it is limited in the ends for which it may act, only by the requirement that treaties be upon a subject proper for international negotiation,[18] that they promote the general welfare of the United States,[19] and that they do not impair the rights and privileges specifically guaranteed by the constitution, to individuals,[20] states[21] and organs of the national government.[22]

In the means it may prescribe for attaining these ends, there are limitations although heretofore little reason has been given for their consideration. The treaty must, so far as it employs organs of the United States at all, for the attainment of these ends, employ them with the organization, procedure and powers defined by the constitution. It can not vest powers, given to one organ, in

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[17]1 Willoughby, *op. cit.*, 493; Wright, 13 Am. Journ. Int. Law, 248; Crandall, *op. cit.*, 266; 5 Moore, Digest, 167.

[18]Jefferson, Manual of Parliamentary Practice, § 52; 1 Willoughby, *op. cit.*, 504; Wright, 12 Am. Journ. Int. Law 94, 13 *ibid.*, 262.

[19]Preamble of Constitution, Anderson, 1 Am. Journ. Int. Law 639.

[20]Constitution, art. 1, sec. 9, cl. 2-8; Amendments, 2-8, 13, 15, 18; Wright, 13 Am. Journ. Int. Law 259.

[21]*States' Rights* such as integrity of territory, Republican form of Government, Immunity of necessary organs from burdening or taxation, limit the ends for which the treaty power may act and are to be carefully distinguished from *state reserved powers,* such as the police power, control of state resources and utilities, which do not. Wright, 13 Am. Journ. Int. Law 253. For distinction between rights and powers, see W. N. Hohfeld, Fundamental Legal Conceptions, 23 Yale Law Journ. 16.

[22]*Rights and privileges* of organs of the government as of members of congress to be privileged from arrest during session and from being questioned for debates, (art. 1, sec. 6, cl. 1); as of the Houses of Congress to judge of the qualifications of their members, (art. 1, sec. 5, cl. 1, 2); as of the President to immunity from judicial process, (Mississippi *v.* Johnson (1866) 4 Wall. 475, 2 Willoughby, *op. cit.*, 1300); and to control of the federal administration by the removal power (2 Willoughby, *op. cit.*, 1181); as of the federal judiciary, to permanence of tenure and compensation (art. 3, sec. 1) and to the issuance of writs and punishments for contempts necessary for the performance of judicial powers (2 Willoughby, *op. cit.*, 1267-1270), limit the ends for which the treaty power may act and are to be carefully distinguished from the *powers* of such organs as of congress to regulate commerce, make appropriations, declare war, etc. (art. 1, sec. 8); of the president to make treaties, nominate, appoint, and commission ambassadors and public ministers and other officers of the United States, to act as commander in chief of the army and navy, and to execute the laws, (art. 2, sec. 2, 3) and of the courts to exercise jurisdiction in specified types of cases, (art. 3, sec. 1) which do not.

another, nor deprive organs of powers given them by the constitution.[23]

Treaties may and in fact, generally do limit the discretion of organs of the government in exercising their constitutional powers, but they can not limit the powers themselves. Conversely, the powers accorded by the constitution to organs of government do not limit the ends for which the treaty power may act, but they do limit the means which it may employ for the attainment of those ends.[24] Thus, while a treaty agreeing that the United States would go to war in certain contingencies would be constitutional,[25] a treaty agreeing that in certain contingencies the President of the United States would declare war, would not. In the first, execution would clearly require action by Congress, which would exercise discretion in deciding whether the circumstances contemplated by the terms of the treaty actually existed. If these circumstances existed Congress would be under a constitutional obligation to declare war. In the second case, however, an effort is made to alter the distribution of power established by the constitution. The power to declare war, given by the constitution exclusively to congress, cannot be transferred to the President.

From the standpoint of the ends for which the treaty power may act, the reservations are believed to contain nothing in violation of guaranteed rights or privileges of individuals, states or organs of the national government. Whether they contain matter not properly a subject for international negotiation or contrary to the general welfare of the United States are political questions which could not come up for judicial decision.[26] It may be noted that the propriety of including provisions of a domestic character, in treaties, even though they are not unconstitutional, has been seriously questioned; one Senator characterizing it as "entirely undignified to ask either the consent or the concurrence of a foreign nation as to how we are to express our desires to withdraw, etc."[27] Such provisions impair the discretion of the constitution amending

[23]1 Willoughby, *op. cit.*, 504; Wright, 12 Am. Journ. Int. Law 94; 13 *Ibid.*, 262.

[24]Wright, Treaties and the Constitutional Separation of Powers in the United States, 12 Am. Journ. Int. Law 64-95. Reserved powers of the state governments do not even limit the means for executing treaties because under the principle of federal supremacy, congress may legislate and create organs necessary to give effect to treaties without appealing to state governments at all. *Infra,* footnote 55.

[25]Wright, *supra,* footnote 24, at p. 72.

[26]Wright, 13 Am. Journ. Int. Law 263.

[27]Senator Walsh of Montana, 58 Cong. Rec. (Nov. 7, 8, 1919) 8534, 8615.

body itself in altering the organization, procedure and powers of organs of the government and are thus in derogation of national independence.[28] In view of these considerations, the President has frequently given effect to treaty reservations of this character offered by the Senate, but has not submitted them to the other powers, a course clearly within his competence.[29]

From the standpoint of the means provided for executing these ends, more definite constitutional criticism is possible. Treaty provisions defining the functions of organs of government may be declaratory of, contrary to or supplementary to the constitution. Declaratory provisions simply restate powers given by the constitution to particular organs, but if they are not drawn with great care to include all the qualifications of the power as given by the constitution, they are apt to deprive other organs of constitutional powers and thus to be contrary to the constitution. They are at best superfluous. Supplementary provisions, on the other hand, may be of international significance by making the effectiveness of clauses of the treaty contingent upon their acceptance by some organ of the government after ratification by the treaty power.[30] Thus by such provisions, organs which would normally be under a moral obligation to act so as to give the treaty effect, may have their complete discretion reserved. Supplementary provisions may also give powers to constitutional organs which could not be exercised in the absence of treaty, as for instance, exterritorial jurisdiction to consular officers.[31]

1. Declaratory and Unconstitutional Reservations.

The first of the proposed reservations provides that "notice of withdrawal by the United States (from the League of Nations)

[28] *Infra,* footnote 113.

[29] Instructions to the President as to future treaty negotiations contained in the resolution consenting to ratification of the Korean treaty of 1882, Malloy, Treaties, 340; Crandall, *op. cit.,* 77, and a stipulation requiring the issue of a certificate by the President before ratification of the treaty contained in the Senate resolution consenting to ratification of the military service convention with Great Britain, June 3, 1918, were not included in the acts of ratification. "It is indicated by the practice respecting ratification, which is an act of the President, that no declaration respecting the method by which the United States shall carry out the provisions of a treaty needs to be included in the *proces-verbal.* A 'reservation' for instance, providing that an act or responsibility under a treaty shall be initiated by congress and not by the President is a declaration which would have no international interest and would not be required to be submitted to the signatory powers for approval." (Memorandum by D. H. Miller, Expert on international law at the Paris Conference, Oct. 25, 1919.) See also, Wright, 4 Minn. Law Rev. 26.

[30] *Supra,* notes 11, 12.

[31] *Supra,* note 13.

may be given by concurrent resolution of the Congress of the United States," i. e. by a resolution not submitted to the President.[32]

The Constitution provides:

"Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."[33]

The need of presidential participation in resolutions abrogating, denouncing, or altering treaties is insisted upon in the Senate[34] and House[35] Rules, Congressional precedents,[36] and court decisions.[37] Concurrent resolutions in which the President does not participate though not authorized by any clause of the constitution[38] and

[32]"Mr. Lodge. * * * This clause was put in, Mr. President, and I support it, because I agree with the Senator from Iowa (Mr. Cummings) that it involves a great advance of Executive Power, which advances too fast and too far in any event. I do not want to see us left where the President, as the Senator from Iowa said, can practically veto our retirement from the league." (58 Cong. Rec. Nov. 8, 1919, 8615).

[33]Art. 1, sec. 7, cl. 3.

[34]"Treaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded. This was accordingly the process adopted in the case of France in 1798." Jefferson's Manual, § 52, Senate Rules, 1913, p. 150.

[35]Rules of House of Representatives, 1914, § 592, p. 254, after quoting above, cites *infra,* note 50.

[36]"Notice to a foreign government of the abrogation of a treaty is authorized by a joint resolution." 5 Hinds, Precedents, 6270.

[37]In reference to a resolution passed by a majority of the Senate, 32 Cong. Rec. 1847, stating the purpose of the Senate in ratifying the treaty annexing the Philippines, the Supreme Court said: "We need not consider the force and effect of a resolution of this sort. * * * It can not be regarded as a part of the treaty, since it received neither the approval of the president, nor the consent of the other contracting power. Fourteen Diamond Rings *v.* United States (1901) 183 U. S. 176. In reference to a reservation in an Indian treaty, the supreme court said: "The power to make treaties is vested by the constitution in the President and Senate, and while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President." N. Y. Indians *v.* United States (1898) 170 U. S. 1; Wright, 4 Minn. Law Rev. 15-16.

[38]Resolutions passed by two-thirds of the Senate proposing amendments to the Constitution as provided in Art. 5, are an exception and are not submitted to the President. 5 Hinds, Precedents, 7029; Hollingsworth *v.* Virginia (1798) 3 Dall. 378; 1 Willoughby, *op cit.,* 529. It may be noted that such submission would in this case be an idle form as the two-thirds vote would assure passage over the President's veto.

apparently prohibited by the one just cited, have been admitted by custom in matters of no legislative effect, such as addresses of condolence or congratulation, or agreements for the procedure of joint committees of the two houses.[39] Treaties are declared the supreme law of the land,[40] so resolutions affecting them are clearly of legislative effect.[41]

Practice has established that treaties may be terminated by the legislative power,[42] by the treaty power,[43] or by the executive

[39]Report of Senate committee on Judiciary, 54th Cong. 2nd Sess. Sen. Rep. 335 stated: "The committee found that the passage of concurrent resolutions began immediately upon the organization of the government, but their use has been not for the purpose of enacting legislation, but to express the sense of Congress upon a given subject, to adjourn longer than three days, to make, amend, or suspend joint rules, and to accomplish similar purposes, in which both houses have a common interest, but with which the President has no concern." (4 Hinds, Precedents, 3483). See also *ibid., 2*: 1566, 1567; 1 Willoughby, *op. cit.*, 568; 58 Cong. Rec. Nov. 7, 1919, 8544.

[40]Constitution, art. 6, sec. 2.

[41]Remarks of Senator Walsh of Montana, 58 Cong. Rec. Nov. 8, 1919, 8607-8609.

[42]By passage of conflicting legislation as Chinese Exclusion acts (1888) in conflict with treaty of 1880. "It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater obligation than the act of Congress. By the Constitution, law made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. * * * It can be deemed only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control. * * * The question whether our government was justified in disregarding its engagements with another nation is not one for the determination of the courts. * * * The court is not the censor of the morals of the other departments of the Government." Field, J., in Chinese Exclusion Cases, (1889) 130 U. S. 581. See also 5 Moore, Digest, 364-370.

By abrogation as municipal law, exercised in case of the French treaties in 1798, act July 7, 1798, 1 Stat. 578; 5 Moore, *op. cit.*, 356; *supra*, note, 34. President Hayes doubted whether this power could be used partially to abrogate a treaty. "As the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress, nor would the assent of China to this partial abrogation of the treaty make the action of Congress in thus procuring an amendment of a treaty a competent exercise of authority under the Constitution." Richardson, Messages, 519; Crandall, *op cit.*, 461.

By resolution of denunciation under the terms of the treaty itself, as exercised in case of the British treaty of 1827, in 1846, of 1854 in 1866, certain articles of treaty of 1871 in 1885, and all treaty provisions in conflict with the Seamans Act of March 1914 by § 16 of that act. See, 5 Moore, Digest, 322-335; Crandall, *op. cit.*, 458-465.

[43]By conclusion of a later treaty with the same parties, 5 Moore *op. cit.*, 363-364; Wright, 11 Am. Journ. Int. Law 576, or by resolution of denuncia-

power.[44] In all of these methods the President participates There are some precedents indicating a power on the part of the President to withdraw even a joint resolution of denunciation which he had previously approved if he subsequently considers continuance of the treaty desirable,[45] but none whatever to indicate any power of congress to act by concurrent resolution on this subject.[46] As a practical matter, it is difficult to see how a congressional resolution disapproved by the President could be brought to the attention of the other contracting parties.[47] The President is the sole agent of communication with foreign governments. Diplomatic communication with foreign governments by persons not acting under his authority is not only unauthorized by

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tion under terms of the treaty passed by two-thirds of the Senate and approved by the President, exercised in the case of the Danish treaty of 1826 in 1856. This latter method was questioned by Senator Sumner on the ground that it was the repeal of a law to which Congress must assent, but, was sustained. "As to this convention and all others of like character, the committee are clear in the opinion that it is competent for the President and Senate, acting together to terminate it in the manner prescribed by the 11th article (of the treaty) without the aid or intervention of legislation by Congress, and that when so terminated it is at an end to every intent, both as a contract between the governments and as a law of the land." Senate Report, No. 97, 34th Cong. 1st Sess., reprinted in Cong. Rec. Nov. 8, 1919, 58: 8605. See also, Message of President Pierce, Dec. 31, 1855; 3 Richardson, *op. cit.*, 334, Crandall, *op cit.*, 459.

[44]"Denunciation of the Russian treaty of 1832 in 1911, and of the Swiss treaty of 1850 in 1899 appears to have been by the President alone, Taft, our chief magistrate and his Powers, (N. Y. 1916) p. 117; Crandall, *op. cit.*, 462. 1 Willoughby, *op. cit.*, 518 approves this method but thinks "in important cases he would undoubtedly seek senatorial approval before taking action." The propriety of this method was questioned by Senator Walsh of Montana, 58 Cong. Rec. Nov. 8, 1919, 8608-8609, though with some hesitation. It may be suggested that analogy to the president's power of removal without consent of the Senate, admitted since the first Congress, 2 Willoughby, *op. cit.*, 1181, even where the appointment required such consent sustains it.

[45]"After the notice (of denunciation of the treaty of 1817 relating to armaments on the Great Lakes) had been communicated to the British government, a joint resolution was passed by Congress approved Feb. 9, 1865, which 'adopted and ratified' the notice 'as if the same has been authorized by Congress.' Notwithstanding this legislative sanction, the notice was, before the expiration of the required six months, withdrawn by the Executive, and the arrangement has subsequently been recognized by both governments, as subsisting." House Doc. No. 471, 56th Cong. 1st. Sess., pp. 32-34; Crandall, *op. cit.*, p. 462.

[46]That the President can participate in treaty denunciation is clearly evidenced by President Hayes' veto of a bill in 1879 which directed the abrogation of articles 5 and 6 of the treaty of 1868 with China. (7 Richardson, *op. cit.*, 518; Crandall, *op. cit.*, 460, *supra*, note 42.)

[47]See remarks by Senator Williams, Miss., and Senator Robinson, Ark., 58 Cong. Rec. Nov. 7, 8, 1919, 8548, 8604. "Congress is as to other govern-

the constitution[48] but would render the person liable to prosecution under federal law.[49] Doubtless a joint resolution passed by two-thirds of both houses over the President's veto would impose a moral obligation upon him to act, but this would not be true of a concurrent resolution passed by a mere majority of both houses. Until the denunciation was notified it is clear that the United States would continue to be bound by the treaty so far as the rights of the other signatories were concerned.

It might be argued that by accepting a concurrent resolution as a method of denunciation in the treaty itself, the other signatories agree in so far to communicate directly with congress. The argument would involve another unconstitutional encroachment upon the President's powers. His sole power to communicate with foreign governments has been admitted in the numerous congressional discussions on the subject of recognizing foreign governments,[50] if it is not implied by his necessary participation in the appointment of "ambassadors, public ministers and counsels"[51]

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ments, 'both deaf and dumb'. Why then, claim for it a power which it could not possibly use save in some roundabout and inconclusive fashion." Corwin, The President's control of Foreign Relations (Princeton, 1917) 82.

[48]*Infra,* footnotes 50, 51.

[49]Under the Logan Act, Jan. 30, 1799, Rev. Stat. sec. 5335, Criminal Code of 1909, art. 5; 4 Moore, Digest, 449; *infra,* footnote 118.

[50]Corwin, *op. cit.,* 71. "Nor can the legislative branch of the government hold any communication with foreign powers. The executive branch is the sole mouthpiece of the nation in communicating with foreign sovereignties. Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity." Report Senate Foreign Relations Committee, 1897, quoted, Corwin, *op. cit.,* 79. President Grant vetoed two joint resolutions in response to congratulations of foreign states on the occasion of the Centennial exposition saying, "The Constitution of the United States, following the established usage of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers, and to receive all official communications from them * * * making him, in the language of one of the most eminent writers on constitutional law, 'the constitutional organ of communication with foreign states.'" 7 Richardson, *op. cit.,* 431; Corwin, *op. cit.,* 44.

[51]Constitution, Art. 2, sec. 2. Corwin, *op. cit.,* 33, 49. In a note to the French government, Secretary Seward commented on a resolution of the House of Representatives stating that it did not "accord with the policy of the United States to acknowledge a monarchical government erected on the ruins of any Republican government in America, under the auspices of any European power." He said, "This is a practical and purely

and his sole authority to receive "ambassadors and public ministers."[52]

In the Senate debate on this reservation, two justifying arguments were adduced. Senator Spencer of Missouri said:

"That Constitutional Provision, (Art. I, sec. 7, cl. 3) is in the Legislative article of the Constitution and has to do with legislative enactments, and has only to do with legislative enactments; and therefore when in the legislative function of the government any concurrent resolution or order or vote is passed by both branches of Congress it needs the consent of the President to make it effective. But that is not true when with regard to treaties, which are also, like the constitution, the supreme law of the land."[53]

The very fact that treaties are the supreme law of the land seems to indicate that when congress acts on them its act is of a legislative character. If the repeal of law is not legislation, it is hard to tell what is.[54] It is true that treaties partake to a certain degree of the constituent character in that they may extend the legislative competence of congress beyond that specified in the constitution,[55] but so far as national law is concerned they are subordinate to the constitution and can not conflict with its definite terms.[56]

Executive question, and the decision of it constitutionally belongs not to the House of Representatives, nor even to Congress, but to the President of the United States. * * * While the President receives the declaration of the House of Representatives with the profound respect to which it is entitled as an exposition of its sentiments upon a grave and important subject, he directs that you inform the Government of France that he does not at present contemplate any departure from the policy which this government has hitherto pursued in regard to the war which exists between France and Mexico." *Ibid,* at p. 42.

[52]Constitution, art. 2, sec. 3. Corwin, *op. cit.,* 46.

[53]58 Cong. Rec., Nov. 8, 1919, 8599.

[54]*Supra,* footnotes 40, 41. Treaties are also international contracts, and as such may be terminated by consent of the parties, the United States acting in such cases through the treaty power, *supra,* footnote 57, or perhaps the President, *supra,* footnote 58, in which case their existence as law would also terminate. Congress, however, having no diplomatic power can act on treaties only in their status as domestic law.

[55]"The power to legislate in regard to all matters affected by treaty stipulations and relations is co-extensive with the treaty-making power, and that acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional and can be enforced, even though they may conflict with state laws or provisions of state constitutions." Butler, Treaty Making Power of the United States, § 3; quoted, 1 Willoughby, *op. cit.,* 506. See also Corwin, National Supremacy (N. Y. 1913) 277; Wright, 11 Am. Journ. Int. Law 6.

[56]*Supra,* footnote 17.

Equally untenable is the argument brought out in the following dialogue:[57]

"Mr. Lenroot, (Wisconsin). Does not the Senator concede that it would be perfectly competent to provide in any treaty that it should cease to be operative upon the happening of any certain event?

"Mr. Thomas, (Colorado). I think so.

"Mr. Lenroot. And could not that event be a concurrent resolution of Congress?

"Mr. Thomas. Well, I doubt it."

Senator Lenroot's argument fails to distinguish between a decision on a question of fact and a question of policy. The distinction is clearly recognized in cases dealing with the delegation of legislative power[58] and was explained by Senator Walsh of Montana:[59]

"A statute or a treaty might end upon the occurrence of a fortuitous event or upon the determination of a certain fact or of a certain condition by a certain officer, he having no discretion on the subject at all; but when it becomes a question of the exercise of his judgment or his discretion about whether the law should

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[57]58 Cong. Rec., Nov. 7, 1919, 8545. See also remarks by Senator Thomas (Colo.), 58 *Ibid.*, 8601, and colloquy of Senator Thomas with Senators Fall (N. Mex.) and Gore (Okla.), *Ibid.*

[58]Field *v.* Clark, (1892) 143 U. S. 649. Harlan, J., quoted with approval Locke's Appeal (1873) 72 Pa. St. 491, "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." See also, 2 Willoughby, *op. cit.*, 1319. A majority of the senate accepted the opinion of the Committee on Foreign Relations on the proposed Taft arbitration treaties of 1911, that it would be an unconstitutional delegation of treaty power to vest an international commission established by the treaty, with power to decide whether a particular case was or was not a justiciable dispute as defined by the treaty. Sen. Doc. No. 98, 62nd Cong., 1st sess. p. 6. A minority of the Committee, (Mr. Root, Mr. Cullom, Mr. Burton) thought this was not a delegation of treaty power, but a delegation of judicial power "to find whether the particular case is one that the President and Senate have said shall be arbitrated." *Ibid.*, at p. 9. The latter opinion has been endorsed by Mr. Taft, *op. cit.*, 107; J. B. Moore, Independent (Aug. 8, 1911); Sen. Doc. No. 98, p. 13; former Senator George Sutherland, Constitutional Power and World Affairs, (N. Y. 1919) 132, and others, and with it the writer agrees. 12 Am. Journ. Int. Law 92. The treaty power may delegate to courts, executive officials, or proper international bodies, power to decide questions of *law* or of *fact*, but not questions of *policy* entrusted to them by the Constitution.

[59]58 Cong. Rec., Nov. 8, 1919, 8609.

remain in force or whether it should be repealed, considering the good of the country, that would be an unlawful delegation of legislative power."

The second of the proposed reservations states that

"Congress * * * under the constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States."

The first part is merely declaratory, the second unconstitutional.

The Constitution provides

"The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States.* * * * He shall take care that the law be faithfully executed."[60]

The powers of the Commander in Chief extend to the conduct of all military operations in time of peace and of war, thus embracing control of "the disposition of troops, the direction of vessels of war and the planning and execution of campaigns," and are exclusive and independent of Congressional power.[61] The duty to execute the laws is not limited to the enforcement of acts of Congress and treaties of the United States, but includes also "the rights, duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the

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[60]Art. 2, sec. 2, cl. 1; sec. 3.

[61]2 Willoughby, *op. cit.*, 1207. "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions. The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns." *Ex parte* Milligan, (1866) 71 U. S. 2. See also Taft, *op. cit.*, 94-99.

nature of the government under the constitution."[62] The President may utilize his powers as Commander-in-Chief at any time in pursuance of this constitutional duty as chief executive.[63]

Thus authority supported by practice shows that the President has independent power under the Constitution to employ the military or naval forces of the United States at home or abroad except as restricted by international law, in time of peace to enforce the laws[64] and treaties,[65] to protect officers of the United States,[66] to prevent obstruction of national functions,[67] to protect the privileges and immunities of American citizens,[68] to prevent foreign

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[62]In re Neagle, (1890) 135 U. S. 1. See also Logan *v.* United States (1892) 144 U. S. 263; 2 Willoughby, *op. cit.* 1155; Taft, *op. cit.*, 78-94.

[63]"In ultimate resort, then, all federal executive authority is in the President, and upon him lies the responsibility for seeing that the laws of the United States are faithfully executed, that is to say, that the armed and other forces of the Nation are, if necessary employed to maintain in efficient operation the government of the United States over such districts as are under its sovereignty, and everywhere and under all circumstances, to protect its officers in the performance of their duties." 2 Willoughby, *op. cit.* 1150.

[64]Acts of Congress are presumed to be of territorial application, American Banana Co. *v.* United Fruit Co. (1909) 213 U. S. 347, consequently the power to use the militia for "executing the laws of the union", Art. 1, sec. 8, cl. 15, has been held to give no warrant for sending the militia abroad, Wickersham, Att. Gen., (1912) 29 op. 322, though a contrary opinion was given by Judge Advocate General Davis in 1908, 42 Cong. Rec., 6943. See Wright, 12 Am. Journ. Int. Law 76. The terms "laws" in art. 2, sec. 3, has been given a much broader application and includes laws of exterritorial effect, as for instance a declaration of war or resolution authorizing the use of force in reprisals or for protective purposes. For instances see Wright, 12 *Ibid.*, 77.

[65]In re Neagle (1890), 135 U. S. 1; Taft, *op. cit.*, 85, see, Pres. Roosevelt's intervention in Cuba, in 1906, under the U. S.-Cuba treaty of 1903, art. 3; Taft, *op. cit.*, 87, and subsequent occupations of the customs houses in San Domingo, Hayti, and Nicaragua on the bases of treaties with those countries.

[66]In re Neagle, *Ibid.* The sending of troops to Pekin by President McKinley in 1900 to protect the American legation besieged by the Boxers is a notable example. 5 Moore, Digest, 476-493. In Logan *v.* United States (1892) 144 U. S. 263, the use of force to protect prisoners in custody of the United States was sustained.

[67]In re Debs (1895) 158 U. S. 564; Taft, *op. cit.*, 97.

[68]In re Neagle (1890) 135 U. S. 1. Among the privileges and immunities of citizens of the United States described in the Slaughter House Cases (1872) 83 U. S. 36, is that "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government." The power of the President to use the forces abroad to protect this privilege of citizens is recognized by authority and has been exercised in numerous cases of which the case of Martin Koszta, has received judicial approval, In re Neagle, *Ibid.*, at p. 64. See Root, address in Senate, Aug. 14, 1912, 48 Cong. Rec. 10929; Taft, *op. cit.*, 96; Corwin, *op. cit.*, 142-156; Borchard, Diplomatic Protection of Citizens Abroad (N. Y. 1912) 452; 7 Moore, Digest, 108-116; Wright, 12 Am. Journ. Int., Law 77-78.

aggression[69] and to protect inchoate interests of the United States abroad;[70] and in time of war to prosecute campaigns, to compel submission of the enemy[71] and to govern occupied territory.[72] It is true that Congress can authorize the use of the armed forces either by Declaration of War or by Joint Resolution in time of peace,[73] and the President is bound to execute such declaration or resolution, but Congress can not impair the concurrent power of the President to authorize the use of forces as given by the constitution.[74]

The seventh proposed reservation provides:

"Until such participation and appointment have been so provided for (i. e. by act of Congress) and the powers and duties of such representatives have been defined by law, no person shall represent the United States under either said league of nations or the treaty of peace with Germany or be authorized to perform any act for or on behalf of the United States thereunder."

The Constitution vests in the President power to make treaties and appoint diplomatic officers with the advice and consent of the Senate and to receive diplomatic officers of other states.[75] These clauses have been interpreted as giving to the President an inde-

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[69]As example see Jefferson's use of force against Tripolitan pirates, 1801, 1 Richardson, *op. cit.*, 326; Corwin, *op. cit.*, 131.

[70]Corwin, *op. cit.*, 156-163. Pres. Roosevelt's dispatch of vessels to Panama in 1903 and threat to employ force if Germany refused to arbitrate the Venezuela question in 1904; 2 Thayer, Life of John Hay (N. Y. 1915) 287 may be cited as instances.

[71]See United States Rules of Land Warfare, 1914, at p. 10. 2 Willoughby, *op. cit.*, 1207-1212.

[72]The power extends to the government of conquered territory after conclusion of peace and prior to organization by congress. Cross *v.* Harrison, (1853) 57 U. S. 164; Santiago *v.* Nogueras (1909) 214 U. S. 260; Magoon, Reports on the Law of Civil Government, 17. See also, 2 Willoughby, *op. cit.*, 1221; Taft, *op. cit.*, 98.

[73]As examples see Resolutions authorizing reprisals against France, 1798-1799, 1 Stat. 361, 572, 578, 743; against Algerine pirates, 1815, 3 Stat. 230; dispatch of frigate Sabine to Assuncion Paraguay, 1858, 11 Stat. 370; 7 Moore, Digest, 109, 155; Wright, 12 Am. Journ. Int. Law 77. In the case of resolution authorizing reprisals against the Tripolitan Pirates, 2 Stat. 129, authorizing landing of Marines in Vera Cruz, Mexico, 1914, 38 Stat. 770; and pursuit of Villa in Mexico, 1916, 53 Cong. Rec., 4274, the action by Congress was subsequent to presidential action.

[74]"The President is made Commander-in-Chief of the army and navy by the Constitution evidently for the purpose of enabling him to defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the army for any of these purposes, the action would be void." Taft, *op. cit.*, 128-129.

[75]Art. 2, sec. 2, 3.

pendent power to negotiate with foreign states, either personally or by personal agents.[76] Although the Senate has occasionally protested this practice, yet it is well established in precedent and has been officially approved by the Senate itself.[77]

Doubtless representatives of the United States permanently participating in the League institutions must be *officers* of the United States.[78] Furthermore, it is well established that officers can be created and their functions defined only by act of Congress.[79] The first part of this reservation is therefore declaratory of the constitution. But in going beyond this and forbidding any person from performing "any act for or on behalf of the United States thereunder" the reservation deprives the President of his constitutional power to negotiate in person or through *agents.* The Senate debate brought out that to accomplish this was the precise purpose of the reservation.[80]

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[76] *Supra,* footnotes, 50-52; Corwin, *op cit.,* 58-70; Foster, The Practice of Diplomacy (N. Y. 1906) 192-215.

[77] "Many precedents could be noted to show that such power has been exercised by the President on various occasions without dissent on the part of Congress. These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents." (Cong. Rec., 53rd: Cong. 2nd Sess., p. 127, quoted Corwin, *op. cit.,* 64.)

[78] United States *v.* Ferreira (1851) 54 U. S. 40; 2 Willoughby, *op. cit.,* 1178.

[79] Art. 2, sec. 2, provides the method of appointment for officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law." Marshall, *C. J.,* commented on the ungrammatical reference of the final "which" to "officers", and held that it evidently was intended to signify "offices" which must therefore be created by act of congress. United States *v.* Maurice (U. S. C. C. 1823) 2 Brock. 96, quoted in 58 Cong. Rec. Nov. 15, 1919, 9054. See discussion as to whether "offices" could automatically come into existence upon a necessity to conclude peace, upon executive decision to participate in a general international conference, or upon recognition and commencement of diplomatic relations with a foreign government, in connection with appointment of negotiators for Treaty of Ghent, 1814, and for Panama Congress of 1825. 4 Elliott, Debates (Washington, 1836), 480-483; Corwin, *op. cit.,* 49-58.

[80] "I understand that it is to advertise to the world our desire to prevent in the future a humiliating and scandalous spectacle such as occurred in Paris, where men, under no obligation of oaths of office, largely unknown and incompetent as compared with the delegations and personnel that confronted them, with the President, assuming without any authority, to speak and to bind the United States, made a farce of the whole transaction, following one of the bloodiest and greatest tragedies that the human race ever endured. That is what I want to prevent, and to insure that it never again occurs in America. The further it is advertised over the world the better I shall be satisfied." Senator Penrose, (Pa.), 58 Cong. Rec. Nov. 15, 1919, 9053. See also remarks, Senator Kellogg (Minn.), and Senator Fall (N. Mex.), *Ibid.,* at p. 9054.

The seventh proposed reservation further provides:

"No citizen of the United States shall be selected or appointed as a member of said commissions, committees, tribunals, courts, councils, or conferences except with the approval of the Senate of the United States."

After providing that major officers of the United States shall be appointed by the President with the advice and consent of the Senate, the constitution states:

"But the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." "The President shall have Power to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next session."[81]

Comparison of the reservation with these two clauses of the Constitution, well illustrates the distinction between a valid limitation of discretion in the exercise of power and an unconstitutional deprival of power, by proposed treaty provisions.[82] Were the reservation in effect the discretion of Congress would have to be exercised in a particular way in providing for the appointment of inferior officers under the League of Nations and the treaty, if international good faith were to be observed; but the power itself would remain. Congress would still have to act to make the vesting of such appointing power legal. On the other hand, the power of the President to make interim appointments, vested in unequivocal terms by the Constitution itself, would be entirely destroyed as to certain officers. In that respect, the reservation is clearly unconstitutional.[83]

2. Reservations supplementary to the Constitution.

Treaty provisions defining the functions of organs of govern-

[81] Art. 2, sec. 2, par. 2, 3.

[82] *Supra,* footnote 23.

[83] See Remarks by Senator Walsh (Mont.), 58 Cong. Rec. Nov. 15, 1919, 9053, who thought this clause unconstitutional also, in that it implied that persons not "citizens of the United States" might be appointed by some authority other than the president acting with advice and consent of the Senate, even though the Senate was sitting and Congress had not otherwise provided. Senator Wadsworth (N. Y.) suggested that the use of the word "citizen" was intended to prohibit citizens of the United States from accepting appointments under the League of Nations from foreign powers, a prohibition which would be an unprecedented impairment of the liberty of American citizens.

ment may supplement the national constitution by making the exercise of powers, vested by the constitution in certain organs, contingent upon consent by other organs,[84] or by vesting powers not vested exclusively in any organ in specified organs.[85] It is believed that no constitutional objection can be made to the inclusion of such provisions in treaties, provided the organ whose consent is required has constitutional competence in the premises.[86] According to constitutional principles independent organs of the government may in many matters limit the discretion of other organs in exercising their constitutional powers.[87] The treaty power may impose obligations upon congress[88] or the President[89] to act so as to give a treaty effect. Congress may pass resolutions requiring the President[90] or the treaty power to act in a specified way.[91] The President may conclude executive agreements obliging action

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[84]*Supra,* footnotes, 11, 12, 30.

[85]*Supra,* footnotes. 13, 31.

[86]Treaties have sometimes made the effectiveness of provisions according aliens the right to acquire real estate in the state dependent upon assent by the state, U. S.—France, 1853, art 7, and these are valid as the control of alien landholding is normally within state power, but it is believed a treaty making the effectiveness of a provision requiring an appropriation of money from the national treasury or declaration of war, dependent upon action by the state governments or by referendum would be an unconstitutional delegation of legislative power by congress. 2 Willoughby, *op. cit.,* 1324.

[87]Taft, *op. cit.,* 138; 12 Wright, Am. Journ. Int. Law, 94.

[88]As a treaty requiring a declaration of war, an appropriation, *etc.,* Wright, *Ibid.,* 82-84.

[89]As a treaty requiring the instruction of diplomatic officers or consuls, the nomination and appointment of officers, the disposition of military forces, *etc.*

[90]As a declaration of war or intervention, *supra,* footnote 73. Congress can not limit the President's discretion in conducting foreign affairs as to matters not expressly within Congressional competence, thus a resolution introduced by Clay in 1818 providing for recognition of the United Provinces of the Rio de la Plata and the McLemore resolution of March, 1916, requesting the President "to warn all citizens of the United States to refrain from travelling on armed merchant vessels" were defeated in Congress the opinion being expressed in each case that they were unconstitutional. Corwin, *op. cit.,* 45, 74, 76; Cong. Rec., 1916, pp. 3700-4.

[91]As resolutions suggesting the acquisition of the Canal Zone, or the conclusion of arbitration treaties. Obviously such a resolution can not be mandatory, as the treaty power might, with its best efforts be unable to get assent of the other state; but the President has usually attempted negotiations when requested by congressional resolutions. Crandall, *op. cit.,* 73-75.

by the treaty power[92] or congress.[93] Congress, the treaty power and the President may make political decisions which the courts are bound to take notice of,[94] and laws, treaties and executive orders which the courts are bound to apply in appropriate cases if made within their constitutional competence.[95] Finally, the courts may give decisions which the President is bound to execute[96] and if on constitutional questions which Congress, the treaty power and the President are bound to respect as authoritative interpretations of the constitution.[97]

The second proposed reservation makes the assumption of obligations under article X of the League Covenant and of obligations to use military or naval forces under any article of the treaty contingent upon consent of Congress, "in any particular case." The treaty power might constitutionally impose an obligation upon congress to declare war in certain cases, but it may, as it would by this reservation, decline to exercise that power.[98] The pro-

[92]As preliminaries of peace Crandall, *op. cit.*, 103, 111; Wright, 4 Minn. Law Rev., 35.

[93]As military agreements and protocols like those for terminating the Boxer uprising, 1901, that for administering San Domingan customs houses 1905, *etc.* Willoughby, *op. cit.*, §§ 200-202; Wright, 4 *op. cit.*, 35. The President's conduct of Foreign Relations may doubtless virtually force Congress to declare war. Pomeroy, Constitutional Law, 565; Corwin, *op. cit.*, 126-131.

[94]As declarations of war, The Prize Cases (1862), 67 U. S. 635; The Pedro (1899), 175 U. S. 354; annexations of territory, Jones *v.* United States (1890), 137 U. S. 202; recognition of new governments and states, Williams *v.* Suffolk Insurance Co. (1839), 38 U. S. 415.

[95]Const. art. 6, sec. 2. On judicial application of executive orders, see Willoughby, *op. cit.*, 1327-1332; Goodnow, The Principles of the Administrative Law of the United States (N. Y., 1905), 85.

[96]Const. art 2, sec. 3. "He shall take care that the laws be faithfully executed." Jackson's refusal to execute the Supreme Court decision in Worcester *v.* Georgia (1832), 29 U. S. 515, on the ground that it was not in accord with the constitution has not been approved. Willoughby, *op. cit.*, 1309.

[97]In exercising political functions; as congressmen voting on a bill, the president vetoing a bill, senators voting on advising and consenting to the ratification of a treaty; the organs concerned may exercise independent judgment in *refusing* consent because they think the bill or proposed treaty unconstitutional, irrespective of previous judicial decisions upholding similar measures, 2 Willoughby, *op. cit.*, 1306; Taft, *op. cit.*, 136, but they are bound by previous decision in *giving* consent to such measures. Thus it would be a breach of duty for Congress to repass a bill just declared unconstitutional by the Supreme Court. The subjective standards of constitutionality of political organs may be more strict than the objective standards of the court, but they can not be less strict.

[98]It has been suggested that the requirement of consent of Congress "in any particular case" has the effect not merely of limiting the exercise of the treaty power but of destroying it all together as to military alliances

posed reservation would also relieve the President of any obligation he would otherwise be under to use the military forces in measures short of war when required by the Covenant. It would also seem to limit the President's discretion in employing the forces to give effect to the treaty by requiring congressional action as a prerequisite.[99]

The third proposed reservation provides that no mandate shall be accepted by the United States "except by action of the Congress of the United States." The acceptance of a mandate would normally be a matter within the treaty power,[100] but the treaty power may by a self denying ordinance, agree that it will not execute this power in the future without the consent of congress.[101]

The seventh proposed reservation makes American participation in commissions, committees, tribunals, courts, councils or conferences provided for in the treaty contingent upon consent of Congress. It is to be noted that according to the terms of the reservation congress is obliged to provide for participation in the Assembly

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and treaties of guarantee. Such an interpretation under which the United States would in the future be incompetent to make treaties such as art. 33 of the treaty with New Grenada of 1846; art. 1 of the treaty with Panama, 1903; art. 14 of the treaty with Hayti, 1914, would make the provision unconstitutional. To the writer it seems that with a proper construction the reservation applies only to future agreements in pursuance of this treaty and not to other agreements of a similar kind. At any rate the reservation would be only a self limitation on the treaty power. If it made a treaty of guarantee in the future with the consent of other parties to this treaty, there would be no violation of constitutional or international good faith.

[99]As has been stated, the independent power of the President to use the forces as required by the constitution can not be impaired by statute or treaty. *Supra,* footnotes 61-63, 74. His discretion in employing them for purposes not laid down in the constitution may, however, be limited. *Supra,* footnote 73.

[100]Treaties annexing territory, (Spain, 1819, 1898), creating quasi-protectorates, (Cuba, 1903); leasing territory, (Panama, 1903), art. 2, executive agreement with Cuba, (1903) have been upheld, American Insurance Co. *v.* Canter (1825), 26 U. S. 511; De Lima *v.* Bidwell (1901), 182 U. S. 1; Wilson *v.* Shaw (1907), 204 U. S. 24, in spite of *dicta* to the effect that congressional sanction was necessary because of the effect on the revenue laws. White, J., dissented in Dooley *v.* United States (1901) 182 U. S. 222, 236, and concurred in Downes *v.* Bidwell (1901), 182 U. S. 244, 313. Senator Walsh, Mont., said he had heard no "suggestion that any action by any other branch of the government, separate from and independent of action by Congress, could amount to assent by the government of the United States." 58 Cong. Rec. Nov. 7, 1919; 8531. But this does not explain why assent could not be given by the treaty power and President Roosevelt's executive agreements in 1903 for leases in Cuba suggest that in less important matters it might be given by the President.

[101]A treaty with the same parties accepting a mandate would supersede conflicting provisions in the earlier treaty and would bind the United States internationally even though congress had not given its consent.

and Council of the League of Nations but its discretion is reserved as to other organs established by the treaty.

The eighth proposed reservation provides that the reparation commission shall interfere with commerce between Germany and the United States only with consent of Congress. The President, under his power to make *modi vivendi*[102] or the treaty power could in the absence of this reservation provide for temporary commercial agreements.

The ninth proposed reservation makes contribution by the United States to the expenses of the League or any commissions contingent upon congressional appropriation. In any case, the appropriation would be dependent upon action by Congress,[103] but in the absence of this reservation Congress would be under obligation to make the appropriation necessary to give effect to the treaty.[104]

By most of these provisions supplementing the Constitution the treaty power would limit its own discretion by agreeing to await the decision of Congress before assuming certain general obligations of the treaty, notably those to guarantee the territorial integrity and existing political independence of members of the League, to participate in commissions provided by the treaty, and to contribute to the expenses of the League; and before assuming special types of obligations in the future as to accept a mandate. The President's discretion in exercising his power to employ the military forces and conclude executive agreements is also limited to a slight extent. Since the provisions of the constitution relating to appropriations of money, regulation of foreign commerce, declaration of war, establishment of offices under the United States, and regulation of territory and property of the United States[105] seem to vest power in Congress over the matters in question, the reservations appear to be constitutional so far as they supplement the constitution.

II. Validity Under International Law

It is a familiar principle that treaties must be in conformity with the policy of international law.[106] Do any of the proposed

[102]1 Willoughby, *op. cit.*, 471.

[103]Constitution, art 1, sec. 9, cl. 7; Wright, 12 Am. Journ. Int. Law, 65-67.

[104]1 Willoughby, *op. cit.*, 480-484; Crandall, *op. cit.*, 164-183.

[105]Constitution, art 1, sec. 8, cl. 1, 3, 11; sec. 9, cl. 7; art. 2, sec. 2, cl. 2; art. 4, sec. 3, cl. 2.

[106]Wilson and Tucket, *op. cit.*, 213; Hall, *op. cit.*, 108.

reservations conflict with that policy (1) by impairing the independence of states or (2) by permitting a state to judge in its own case?

(1) From the doctrine of the independence and sovereignty of the states of the union within their sphere the United States Supreme Court has drawn the principle that the National government can not tax or burden state organs of government.[107]

"The exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government."

It is believed that the analogy does not apply. A burdening of national organs of government by treaty is not placing them under the control of "another and distinct government" but of the general law. Unquestionably organs of state governments within the United States may be burdened by constitutional amendment, in fact they are so burdened by numerous clauses of the Constitution.[108] Now a treaty in its effect on independent states is more analogous to a constitutional amendment in its effect on the states of the Union than it is to an act of Congress. States may by agreement limit their future exercise of sovereignty;[109] in fact they do so by almost every treaty they conclude.

Admitting the validity of such treaty provisions under international law, what is their effect, on the amending power within

[107]Collector *v.* Day (1870), 78 U. S., 113; Willoughby, The American Constitutional System (N. Y., 1904), 122 *et seq.*

[108]Thus state legislatures were originally required to elect senators (art. 1, sec. 3, cl. 1, superseded by Amend. 17), and are still required to provide details for holding elections for senators and representatives (art. 1, sec. 4, cl. 1), and for the appointment of presidential electors (art. 2, sec. 1, cl. 2), and to ratify amendments to the federal constitution (art. 5). They are empowered to provide for vacancy appointments of senators (Amend. 17) and to apply for federal protection in case of domestic violence (art. 4, sec. 4). State executives are required to issue writs for election to fill vacancies of senators and representatives (art. 1, sec. 1, cl. 4, Amend. 17), and are empowered to demand rendition of fugitives from justice in other states (art. 4, sec. 2), and to apply for federal protection in case of domestic violence when the legislature cannot be convened (art. 4, sec. 4). State judges are bound by the federal constitution, laws and treaties (art. 6, sec. 2) and all state officers are required to take an oath or affirmation to support the federal constitution (art. 6, sec. 3). Many other provisions of the constitution limit the powers or impose obligations upon the "states" without specifying particular organs (art. 1, sec. 10, art. 3, sec. 2, art. 4, sec. 1, Amend. 14, 15).

[109]For distinction between a limitation of the exercise of sovereignty and a limitation of sovereignty itself see argument of E. Root, in North Atlantic Fisheries Arbitration Case, 1909.

the state, and on the international competence of the organs affected?

American courts have held that where definite duties are given to state organs by the federal constitution, these duties can not be transferred to other organs by the state constitution.[110] It is believed the same principle would apply to treaties. A power given by the treaty to congress to declare war or accept a mandate, or to the President acting with the advice and consent of the Senate to make appointments to the League organs could not be altered by constitutional amendment without a violation of international good faith. An amendment vesting such powers in, for instance, a referendum of the people could not affect the power of Congress or of the President and Senate as the case might be internationally to bind the United States under the treaty. Thus in spite of such an amendment the United States would be held responsible for a mandate accepted by Congress, and the League would seat a representative appointed by the President and Senate but not one chosen by popular election of the People of the United States. Under constitutional law of course the organs of the United States would be bound by the amendment.

Do treaty provisions of the kind under consideration make it incumbent upon other parties to inform themselves of the action of the domestic organs involved? It is believed they do. Normally states communicate only through their foreign offices and are presumed to know the constitution of other states only so far as they

[110]The incompetence of state constitutions to vest the appointment of United States Senators in any authority other than the state legislature (prior to adoption of the 17th Amendment) was not questioned though sometimes practically evaded by primary election laws virtually controlling the state legislatures. 1 Willoughby, *op. cit.*, 559. The ratification of federal constitutional amendments by state legislatures have been held valid and not subject to referendum even when the state constitution provided for referendum on legislative acts, Herbring *v.* Brown, (Ore. 1919) 180 Pac. 328, especially in the opinion of Attorney General there quoted; In re Opinion of Justices (Me. 1919) 107 Atl. 673. *Contra*, State *ex rel* Muller *v.* Howell (Wash. 1919) 181 Pac. 920. The extension of suffrage for presidential electors to women by state legislatures has been sustained even when the state constitutions confined suffrage to "male citizens". *Dictum* in Vertres *v.* State Board of Election (Tenn. 1919) 214 S. W. 737; and see Senate report on Privileges and Election, 1874, 43rd Cong. 1st. Sess., No. 395, though there is authority to the effect that Presidential electors are exclusively state officers and consequently the method of their appointment is not limited by art. 2, sec. 1, cl. 2 of the federal constitution. In re Opinion of the Justices, *Ibid.*, 2 Willoughby, *op. cit.*, 1126. Hall, Cases on Constitutional Law (1913) 149-150 and cases there cited. A woman suffrage measure defeated in Ohio in 1917 on referendum as permitted by the state constitution has not been put into effect although it was duly passed by the state legislature.

define the authorities for conducting international negotiations[111] and for concluding treaties.[112] Where a treaty provision is contingent upon legislative action it is believed that under international law foreign states are entitled to enter into direct communication with that organ.[113] Usually, as is the case in the United States, such communication would be unconstitutional,[114] or even a positive offense.[115] The resulting conflict between constitutional and international law seems to require that the organs of international communication correctly advise foreign states of the action of such other organs of government and that foreign governments accept such reports in good faith.

(2) It is a recognized common-law principle that no one should be judge in his own case, and there has been judicial opinion in England to the effect that even an act of Parliament infringing this principle would be in so far void.[116] The same principle is recognized in the federal system of the United States and a jurisdiction is established to try cases between states.[117] So also in international law it has been recognized on occasion that treaties should be interpreted not by each party according to its own opinion,[118] but by judicial process,[119] arbitration,[120] or agreement of the parties.[121]

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[111]Wilson and Tucker, *op. cit.*, 167.

[112]*Supra*, footnote 6.

[113]"Mr. Fall. I may premise by saying that I concur with what the Senator (Mr. Williams, Miss.) has stated as a general proposition, but under the peculiar circumstances here and under the constitution of the league I have not the remotest doubt that a concurrent resolution could be directed to be filed with the permanent secretary of the council of the league of nations* * * because it is provided distinctly that he shall make up the matter to be presented to the council at its meetings." Cong. Rec. Nov. 7, 1919, 8548.

[114]*Supra*, footnote 48.

[115]*Supra*, footnote 49.

[116]Dr. Bonham's Case, (1200) 8 Co. Rep. *107a, *114a; Day *v.* Savadge (1610) Hob. 85, 87; City of London *v.* Wood (1701); 12 Mod. 669, 687; Thayer, Cases on Constitutional Law, 47 *et seq.*

[117]Constitution, art 3, sec. 2.

[118]"Neither of the parties who have an interest in the contract or treaty may interpret it after his own mind." 2 Wattel, Le Droit des Gens, c. 17, § 265. See also Wright, 4 Minn. Law Rev. 29.

[119]Wilson *v.* Wall (1867) 73 U. S. 83, 84; 5 Moore, Digest, 208; Crandall, *op. cit.*, 364.

[120]1 Hague Conventions, 1907, arts. 38, 82; Treaties concluded by U. S. with Great Britain and other countries, 1908, art. 1; Malloy, Treaties *etc.*, 814; League of Nations Covenant, art. 13.

[121]Crandall, *op. cit.*, 225, 387; Dalloz, Juris. Gen. Supt. t. 17, (1896), s. v. Traite Int. No. 14; Wright, 12 Am. Journ. Int. Law 92.

The proposed reservations provide that the United States (or specified organs thereof) shall judge for itself as to the right of withdrawal from the League (No. 1), as to the fulfilment of obligations under article X in every particular case (No. 2), as to the extent of domestic jurisdiction (No. 4), as to the meaning of the Monroe Doctrine (No. 5), and as to its obligation to contribute to the expenses of the League (No. 9). Are these proposals to reserve self-determination in the interpretation and application of certain clauses of the treaty, contrary to accepted principles and practice of international law? The distinction must be borne in mind between (a), moral obligations, the interpretation and application of which belong to the conscience of the parties and (b), legal obligations the interpretation and application of which belong to external authority.[122] Obligations assumed under treaty may be of either character, while (c) obligations imposed by general international law are always legal and to be distinguished from the requirements of international morality, comity, and courtesy.[123]

(a) The presumption still is that obligations and responsibilities undertaken by treaty in derogation of the sovereignty of the parties as understood by general international law, are moral rather than legal in character.[124] Though recent arbitration and pacific settlement conventions, recommending or requiring that international controversies be submitted to impartial authority, show a tendency toward the common-law principle,[125] yet these have usually excepted

[122]"When I speak of a legal obligation, I mean one that specifically binds you to do a particular thing under certain sanctions. That is a legal obligation. Now a moral obligation is of course superior to a legal obligation, and, if I may say so, has a great binding force; only there always remain in the moral obligation the right to exercise judgment as to whether it is indeed incumbent upon one in those circumstances to do that thing. In every moral obigation there is an element of judgment. In a legal obligation there is no element of judgment." Pres- Wilson, Statement to Senate Foreign Relations Committee, Aug. 19, 1919, Hearings, 66th Cong. 1st. Sess., Senate Doc. No. 106.

[123]Hall, *op. cit.*, 14. For criticism of Austin's statement that all international "law" is really international morality, see J. B. Moore, 9 Am. Pol. Sci. Rev. 4-6.

[124]"The right to regulate the liberties conferred by the treaty of 1918 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign unless the contrary be provided." Opinion of court in North Atlantic Fisheries Arbitration, 1909, Wilson, The Hague Arbitration Cases, Boston, 1915, p. 154.

[125]The interpretation of treaties is declared a justiciable question in the treaties cited. Footnote 120, *supra.*

questions of national honor, vital interests and independence.[126] It is believed that withdrawal from the League of Nations, guarantee of territorial integrity and political independence, extent of domestic jurisdiction and the meaning of foreign policies like the Monroe Doctrine would come within these exceptions.[127]

It is however, in this precise matter that the League is intended as an innovation on existing practice. To assure the "firm establishment of the understandings of international law as the actual rule of conduct among governments" and the "maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another"[128] the League Covenant has provided organs for the interpretation of international obligations and the settlement of international controversies. The intention is clear that all justiciable international controversies shall be submitted to arbitration or an international court for final settlement;[129] and that all other international controversies shall go to the Council or Assembly or other conciliar body for discussion and recommendation which will be final in case the decision is unanimous, with the exception of the parties

[126]Treaties concluded by U. S. with Great Britain and other countries, 1908, art. 1; Malloy, *op. cit.* 814. Crandall, *op. cit.*, 362. The Bryan treaties concluded in 1913-14 by the United States with 20 states are an exception. That with France provides, "Any disputes arising between the Government of the United States of America and the Government of the French Republic, of whatever nature they may be, shall, when ordinary diplomatic proceedings have failed and the high Contracting Parties do not have recourse to arbitration, be submitted for investigation and report to a Permanent International Commission constituted in the manner prescribed in the following article. The High Contracting Parties agree not to resort, with respect to each other, to any act of force during the investigation to be made by the Commission and before its report is handed in." Art. 2 provides that the commissioners shall be appointed for one year. A reservation introduced by Senator Reed, Mo., to except questions of honor and vital interests from the league was rejected, yeas 36, nays 56, not voting 3. 58 Cong. Rec. Nov. 17, 1919, 9140. See remarks by Senator Lodge in support, *Ibid.*, at pp. 9133, 4.

[127]"We are bound in honor—you can not put a legal construction upon it—to see in concert with others that these arrangements are maintained." Lord Derby, explaining treaty guaranteeing Luxemburg neutrality, 1867, Hansard, 3rd Ser., 187: 1922; Hall, *op. cit.*, 355. "It (art. 10) is a moral, not a legal obligation, and leaves our congress absolutely free to put its own interpretation upon it in all cases that call for action. It is binding in conscience only, not in law." Pres. Wilson, Statement to Senate Foreign Relations Committee, Aug. 19, 1919, 66th Cong. 1st Sess., Sen. Doc. 106, p. 502.

[128]Covenant of League of Nations, preamble.

[129]*Ibid.*, art. 12-14.

to the dispute.[130] In short the purpose is to place members of the League under a more definite responsibility for the preservation of international law and treaty obligation.[131] A controversy as to the

[130]Wright, Effects of the League of Nations Covenant, 13 Am. Pol. Sci. Rev. 556-558. To decide how far the Covenant carries out this purpose by its specific terms is of importance, in view of President Wilson's statement that the obligations upon the fulfilment of which withdrawal from the league is contingent (art. 1) and the obligations imposed by articles 10 and 11 are wholly moral in character. Hearings Senate Foreign Relations committee, 66th Cong. 1st Sess. Sen. Doc. 106, pp. 502, 507, 514-517, 534-535. With this the writer is unable wholly to agree. Determination of the authority competent to decide a controversy must be distinguished from determination of the controversy itself, and in the latter, determination of the existence of an obligation must be distinguished from determination of the means for fulfilling it. Where all of these questions are decided by an external authority the obligation is wholly legal, where all by the conscience of the parties, it is entirely moral. Clearly there may be cases between. Because of the preexisting state of international law the presumption is that obligations in the treaty in derogation of sovereignty are of the latter character.

As to the means for carrying out obligations, the Covenant does not in general attempt to impose the decision of any external authority. It is true the Council or Assembly may advise, or recommend but decision as to the mode of execution belongs to the parties, with two minor exceptions. If a disarmament program is accepted by any state that state can not exceed it without concurrence of the Council (art. 8) and if the degree of authority, control or administration to be exercised by a Mandatory is not agreed to by the power undertaking the mandate, the Council may explicitly define it (art. 22.)

As to the existence of obligations the Covenant provides that in justiciable international disputes, decision shall be by diplomacy, arbitration, or the permanent court of international justice, (arts. 13, 14) in non- justiciable "disputes likely to lead to a rupture" decision shall be by diplomacy or by the Council or Assembly in case they are unanimous with exception of the parties to the dispute (art. 15) and in "matters by international law solely within the domestic jurisdiction" and "regional understandings like the Monroe Doctrine" by the party so claiming. (arts. 15, 21).

As to the authority competent to decide the jurisdiction, *i. e.*, whether the question is justiciable or non-justiciable or domestic, or within the Monroe Doctrine, the Covenant provides that it shall be by diplomacy except that "all disputes likely to lead to a rupture" shall be submitted to the Council or at choice of either party to the Assembly for preliminary consideration of the question of jurisdiction, decisive only in case the vote is unanimous with exception of the parties to the dispute, or if in the Assembly with exception also of less than a majority of the members other than the members represented on the Council. (art. 15). Thus though international controversies in any matter not settled by diplomacy would have to be submitted to the Council or Assembly for preliminary hearing on jurisdiction, decision on the merits would, in the absence of agreement to arbitrate, rest with the conscience of each party if a single state represented on the Council or a majority of the other members, aside from either party to the dispute, held that the question was domestic or within the Monroe Doctrine, or refused to concur in a recommendation on any other question. Even though the League assumed jurisdiction, its competence would be exhausted with a binding statement of the obligation—it could not decide the manner of execution. Thus though obligations under the Covenant are in the main moral in character, in every case there is a slight legal element.

[131]League of Nations Covenant, arts. 12, 15.

limits of national competence is necessarily an international controversy. Thus these proposed reservations are entirely out of harmony with the spirit of the Covenant;[132] they also amend the letter of it as at present drafted.[133]

(b) Treaty obligations not relating to national honor, vital interests or independence are assumed to be legal in character[134] but the treaty itself may permit self-determination by the parties and no violation of international law can be alleged. The obligation assumed by the United States to participate in certain agencies of the League would normally impose a legal obligation to contribute to the expenses necessarily attendant upon such participation, on the principle that "every * * * obligation which is necessarily attendant upon something clearly ascertained to be agreed to in the treaty * * * is understood to be tacitly * * * imposed by the * * * imposition of that upon which it is attendant."[135] Yet express reservation of self-determination in the latter, as is done by reservation 9, would not violate International law, though on the principle that "special permissions take precedence of general imperative provisions,"[136] it would practically nullify the obligation to participate in the League.[137]

The provision in reservation No. 1, that "the United States shall be sole judge as to whether * * * all its obligations under the said Covenant have been fulfilled" in case of notice of withdrawal from the League of Nations, seems to leave it to the discretion of the United States, by giving such notice, to deprive all

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[132]Wright, 13 Am. Pol. Sci. Rev.: 566, 569, 572.

[133]By art. 12 "any dispute likely to lead to a rupture" is to be submitted to arbitration or inquiry. Clearly the non-existence of international obligations and obligations under the covenant made by art. 1 a condition precedent to withdrawal from the league; the fact of "external aggression" against "the territorial integrity or existing political independence of a member of the League" (art. 10); and the existence of "a question by international law wholly within the domestic jurisdiction" of a party so claiming (art. 15) or of a "regional understanding like the Monroe Doctrine" (art. 21) might involve such a dispute, and also it would seem a dispute as to the interpretation of a treaty, as to a question of international law or as to the existence of a fact, which if established would constitute a breach of an international obligation, declared by art. 13 to be "generally suitable for submission to arbitration." Article 15, however, specifically provides that the existence of a domestic question is to be "found by the Council" on claim of one party.

[134]*Supra,* footnote 123.

[135]Hall, *op. cit.,* 349.

[136]*Ibid.,* at p. 350.

[137]League of Nations Covenant, arts. 3-6, and Lodge Reservation 7, clause 1.

obligations in the Covenant of legal character. Though completely destructive of the spirit and terms of the treaty,[138] it is not contrary to international law.

(c) Legal obligations founded on recognized international law may not be modified by treaty as to non-signatories, and even as to parties to the treaty the presumption is against such modification.[139] A definite conflict with this principle seems to exist in the provisions of the first proposed reservation that "the United States shall be the sole judge as to whether all its international obligations * * * have been fulfilled" in case of notice of withdrawal from the League of Nations. This appears to state the astonishing doctrine that by giving notice of its withdrawal from the League, the United States could repudiate, before the bar of conscience alone, an arbitration award, a claim for reparation or any other obligation of international law, in favor of any state, whether a party to the treaty or not. This provision conflicts with the painfully achieved principle that justiciable questions should be settled by arbitration or judicial process and is in fact a wholesale denial of any legal character to international "law."[140]

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[138] *Supra*, footnotes 132, 133.

[139] Wright, 11 Am. Journ. Int. Law, 568-576.

[140] *Supra*, footnotes 118-121, 125.

[141] The full text of the proposed resolution of ratification (58 Cong. Rec. Nov. 19, 1919, 9289) with the clauses believed by the writer to be unconstitutional, declaratory of the constitution and so superfluous, or contrary to international law printed in italics is as follows:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the treaty of peace with Germany concluded at Versailles on the 28th day of June, 1919, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution of ratification, which ratification is not to take effect or bind the United States until the said reservations and understandings adopted by the Senate have been accepted by an exchange of notes as a part and a condition of this resolution of ratification by at least three of the four principal allied and associated powers, to wit, Great Britain, France, Italy, and Japan:

1. The United States so understands and construes article 1 that in case of notice of withdrawal from the league of nations, as provided in said article, the United States shall be the sole judge as to whether *all its international obligations and* all its obligations under the said covenant have been fulfilled, *and notice of withdrawal by the United States may be given by a concurrent resolution of the Congress of the United States.*

2. The United States assumes no obligation to preserve the territorial integrity or political independence of any other country or to interfere in controversies between nations—whether members of the league or not—under the provisions of article 10, or to employ the military or naval forces of the United States under any article of the treaty for any purpose, unless in any particular case the Congress, *which, under the Constitution,*

In summary, it is believed that no legal objection can be found to the substance of the proposed reservations from the standpoint of constitutional or international law with the exception of the

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has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide.

3. No mandate shall be accepted by the United States under article 22, part 1, or any other provision of the treaty of peace with Germany, except by action of the Congress of the United States.

4. The United States reserves to itself exclusively the right to decide what questions are within its domestic jurisdiction and declares that all domestic and political questions relating wholly or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, commerce, the suppression of traffic in women and children and in opium and other dangerous drugs, and all other domestic questions, are solely within the jurisdiction of the United States and are not under this treaty to be submitted in any way either to arbitration or to the consideration of the council or of the assembly of the league of nations, or any agency thereof, or to the decision or recommendation of any other power.

5. The United States will not submit to arbitration or to inquiry by the assembly or by the council of the league of nations, provided for in said treaty of peace, any questions which in the judgment of the United States depend upon or relate to its long-established policy, commonly known as the Monroe doctrine; said doctrine is to be interpreted by the United States alone and is hereby declared to be wholly outside the jurisdiction of said league of nations and entirely unaffected by any provision contained in the said treaty of peace with Germany.

6. The United States withholds its assent to articles 156, 157, and 158, and reserves full liberty of action with respect to any controversy which may arise under said articles between the Republic of China and the Empire of Japan.

7. The Congress of the United States will provide by law for the appointment of the representatives of the United States in the assembly and the council of the league of nations, and may in its discretion provide for the participation of the United States in any commission, committee, tribunal, court, council, or conference, or in the selection of any members thereof and for the appointment of members of said commissions, committees, tribunals, courts, councils, or conferences, or any other representatives under the treaty of peace, or in carrying out its provisions, *and until such participation and appointment have been so provided for and the powers and duties of such representatives have been defined by law, no person shall represent the United States under either said league of nations or the treaty of peace with Germany or be authorized to perform any act for or on behalf of the United States thereunder, and no citizen of the United States shall be selected or appointed as a member of said commissions, committees, tribunals, courts, councils, or conferences except with the approval of the Senate of the United States.*

8. The United States understands that the reparation commission will regulate or interfere with exports from the United States to Germany, or from Germany to the United States, only when the United States by act or joint resolution of Congress approves such regulation or interference.

9. The United States shall not be obligated to contribute to any expenses of the league of nations, or of the secretariat, or of any commission, or committee, or conference, or other agency, organized under the league of nations or under the treaty or for the purpose of carrying out the treaty provisions, unless and until an appropriation of funds available for such expenses shall have been made by the Congress of the United States.

clauses referred to in reservations one, two and seven, believed to be unconstitutional, and that in reservation one, believed to conflict with the rights of third states under international law.[141]

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10. If the United States shall at any time adopt any plan for the limitation of armaments proposed by the council of the league of nations under the provisions of article 8, it reserves the right to increase such armaments without the consent of the council whenever the United States is threatened with invasion or engaged in war.

11. The United States reserves the right to permit, in its discretion, the nationals of a covenant-breaking State, as defined in article 16 of the covenant of the league of nations, residing within the United States or in countries other than that violating said article 16, to continue their commercial, financial, and personal relations with the nationals of the United States.

12. Nothing in articles 296, 297, or in any of the annexes thereto or in any other article, section, or annex of the treaty of peace with Germany shall, as against citizens of the United States, be taken to mean any confirmation, ratification, or approval of any act otherwise illegal or in contravention of the rights of citizens of the United States.

13. The United States withholds its assent to Part XIII (articles 387 to 427, inclusive) unless Congress by act or joint resolution shall hereafter make provision for representation in the organization established by said Part XIII, and in such event the participation of the United States will be governed and conditioned by the provisions of such act or joint resolution.

14. The United States assumes no obligation to be bound by any election, decision, report, or finding of the council or assembly in which any member of the league and its self-governing dominions, colonies, or parts of empire, in the aggregate have cast more than one vote, and assumes no obligation to be bound by any decision, report, or finding of the council or assembly arising out of any dispute between the United States and any member of the league if such member, or any self-governing dominion, colony, empire, or part of empire united with it politically has voted.